IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4101 OF 2004

Shri Dharma Kashiram Zirwal & Anr. ...Petitioners
(Orig.Defendants)

V/s.

Smt.Mathyabai Yashwant Imphal ...Respondent
(Orig.Plaintiff)

Mr.Prashant Patil for the Petitioners.
Mr.J.N. Pawar for the Respondent.

CORAM : J.H. BHATIA, J.

DATED : OCTOBER 26, 2007

P.C. :-

1. Rule. Rule made returnable forthwith. By consent of parties, the matter is taken up for final hearing forthwith.

2. Admitted facts are that the respondent had filed Regular Civil Suit No.68/1990 in the Court of Civil Judge, Junior Division, Dindori, District Nashik, for removal of encroachment and for possession of 64 R of the land against the defendants/petitioners. Suit summonses were served on the defendants and they also appeared on 13th November, 1990 and engaged a lawyer to defend the suit on their behalf. No written statement

was filed and on 31st December, 1992, the learned trial Court passed an order to proceed without written statement. On 6th March, 1995, evidence of the plaintiff-respondent came to be recorded and on 12th June, 1995, a decree was passed against the defendants. Thereafter, on 3rd February, 1996, the defendants filed Misc.Civil Application No.3/96 under Order 9 Rule 13 of CPC for setting aside the exparte decree and to restore the matter to the file. It was alleged that the defendants had engaged one Mr.B.K. Choure, Advocate to conduct the case on their behalf, however, that Advocate never communicated dates to the defendants and that the defendants come from Kokani community and are not acquainted with the court procedure. It was also contended that defendant no.2 was consistently ill for long time and the responsibility of the family was on defendant no.1 and he could not appear before the court for the above reasons. They contended that on 21st January, 1996, when the bailiff had come for execution of the decree, for the first time they had come to know that exparte decree was passed against them. Thereafter, they immediately moved and on 3rd February,

1996 i.e. within 13 days, they filed an application under Order 9 Rule 13 of CPC. The application was opposed on behalf of the plaintiff-respondent wherein she denied all the reasons given by the defendants for setting aside the exparte decree. At the outset, it may be stated that once this application was also dismissed in default but later on, it was restored to the file. On 17th July, 2003, this application came to be rejected by the learned Civil Judge, Junior Division, Dindori, observing that the suit was decreed under Order 8 Rule 10 of CPC and therefore, the provisions of Order 9 Rule 13 are not applicable. He observed that the only remedy available to the defendants-petitioners was to prefer an appeal against the decree. Against the rejection of that application, defendants-petitioners preferred Misc.Civil Appeal No.116/2003 which also came to be dismissed on 21st November, 2003. Thereafter, the defendants have preferred the present petition challenging rejection of their application under Order 9 Rule 13 of CPC. It may also be noted that the exparte decree was executed and possession of the land was given to the plaintiff-respondent on 21st August, 2003.

3. Heard the learned Counsel for the parties.

4. The learned Counsel for the petitioners-defendants vehemently contended that the learned trial court committed an error in holding that the application under Order 9 Rule 13 is not tenable in the given circumstances. In respect of this contention, he relied on number of authorities from this High Court. He also contended that the petitioners had given sufficient reasons for remaining absent from the court and those reasons are not properly considered. According to him, the learned Appellate Court dismissed the appeal mainly on the ground that the decree was already executed though other reasons were also given.

5. On the other hand, the learned Counsel for the respondent supported the decisions of the court below. According to him, there is no evidence that the defendant no.2 was seriously ill and was unable to attend the court and there was no reason for the defendant no.1 to remain absent. He also contended that

there is no evidence to show that the Advocate had not communicated the dates to the defendants and because of that reason, they had not appeared. According to him, the defendants are habitual in remaining absent and therefore, even their Misc.Civil Application No.3/96 was also dismissed in default once though it was restored later on. He contended that as the decree was passed in the year 1995 and it was also executed in August 2003, now there is no justification to set aside the decree.

6. After hearing the learned Counsel for both the parties, I find that in number of cases, this Court has held that when the defendant has not filed written statement but the decree is not passed under Order 8 Rule 5 of CPC and the matter had been adjourned for evidence and on the adjourned date of hearing also, defendant was not present and the evidence of the plaintiff was recorded, the Court has proceeded under Order 17 Rule 2 of CPC and if after recording the evidence of the plaintiff, decree is passed, it is exparte decree and an application under Order 9 Rule 13 of CPC is tenable. This view was taken by this Court in

1) **The Streamship Mutual Underwriting Association (Bermuda) Ltd. & Ors. V/s. Thakur Shipping Company Limited & ors. (2001 (3) ALL MR 159),** 2) **Badrinarayan s/o. Raghunath Sharma V/s. Suresh Nathamal Gothawal (2002(4) Mh.L.J. 522,** 3) **Gaurang V. Merchant & Ors. V/s. Madhliso & Co.Pvt.Ltd. & Ors. (2004(2) All MR 737)**, 4) **Chandrakant Babulal Panchal & another V/s. Ashwinibhai Mancharam Patel & another (2003(1) Bom.C.R. 37)** and 5) **Ashok Ravji Vadodriya V/s. Municipal Corporation of Greater Bombay (2003(3) Mh.L.J. 1003).** In view of the consistent view of this Court in this respect and the facts of this case, it must be held that it was an exparte decree and the application under Order IX Rule 13 CPC to set aside, the same is tenable. The learned trial Court rejected the application on the sole ground that the application Under Order 9 Rule 13 is not tenable. It appears that the learned Appellate Court only noted the contentions on behalf of the plaintiff and the observations of the trial Court in this respect but did not express any view on this point. In view of the legal position stated above, it must be held that the courts below were wrong in rejecting the application

on the ground that provisions of Order 9 Rule 13 are not applicable in such matter.

7. It is true that no reliable evidence was placed on record to show the defendant no.2 was seriously ill and due to that reason, defendants could not remain present. However, it was also the stand of the defendants that they had engaged Mr.B.K. Choure, Advocate to conduct the matter on their behalf. It is also their contention that they belong to backward Kokani community having no knowledge of the court proceedings. Admittedly, the parties are residents of villages situated in Dindori Taluka, District Nashik which is a tribal area. In view of this fact, there appears substance in the contention of defendants that they being the members of backward community, did not have sufficient knowledge of procedure of the court and therefore, their had to depend on the lawyer engaged by them for this purpose. They have stated on affidavit that they had engaged the Advocate who did not communicate the dates to them and therefore, they did not appear. In the case of **Ashok Ravji Vadodriya V/s.**

Municipal Corporation of Greater Bombay (Supra) in the similar circumstances, the learned Single Judge of this Court held that it will not be appropriate to hold that it is the duty of the litigant to attend the court and convey the adjourned date to his Advocate. The learned single Judge also referred to observations of Supreme Court in **Rafiq and another vs. Munshilal and anr. ((1981) 2 SCC 788**) wherein the Apex Court had recorded that the obligation of the party is to select his Advocate, brief him, pay the fees demanded by him and then trust the learned Advocate to do the rest of the things. These observations will be aptly applicable to the parties particularly when they come from the backward tribal areas. Taking into consideration these observations, I find that sufficient reasons are given by the defendants in their application for setting aside the exparte decree.

8. The learned Counsel for the respondent-plaintiff contended that as noted by the courts below, the defendants have not filed even an application for condonation of delay. I find that there is no force in

this argument particularly because in the application, the defendants had specifically stated the circumstances under which they had not attended the Court and on 21st January, 1996 for the first time they came to know about the exparte decree when the court Bailiff had come to execute the decree. In given circumstances, the period of limitation would begin to run from the date of knowledge. The application under Order 9 Rule 13 was filed on 3rd February, 1996 i.e. within 13 days after knowledge. Therefore, the application was within the period of limitation and it was not necessary to move application for condonation of delay.

9. The learned Appellate Court dismissed the appeal mainly because that the decree was already executed and the plaintiff was put in possession of the land though other reasons were also given. In my opinion, the execution of the decree could not be a reason for rejection of application under Order 9 Rule 13 if otherwise sufficient reasons were given. Even if that application is allowed, it is not necessary to dispossess the plaintiff from the property immediately.

The possession of the plaintiff could be protected but the defendants could be given an opportunity to file written statement and to contest the suit and in case, the plaintiff fails and the defendants succeed, the possession of the land, which was taken during execution of the decree, could be restored to the defendants under the law. In my considered opinion, no prejudice or inconvenience would be caused to the plaintiff if application under Order 9 Rule 13 would have been allowed. Taking into consideration all the facts, I find that the courts below committed an error in rejecting the application and appeal of the appellant and therefore, petition deserves to be allowed.

10. In the result, the petition is allowed. The impugned orders passed by the courts below are set aside. Misc.Civil Application No.3/96 filed before the C.J.J.D. Dindori, is hereby allowed. Exparte Decree passed in Regular Civil Suit No.68/90 is hereby set aside and the said suit is remanded back to the CJJD, Dindori, for disposal as per law again after giving an opportunity to the defendants to file written statement

within six weeks from this date.

11. It is hereby clarified that the plaintiff, who was put in possession of the suit land in execution of the decree which is now set aside, shall be allowed to remain in possession pending the suit. However, in case, the plaintiff finally fails to prove her title over that land, the defendants shall be entitled to restoration of possession as per law.

12. Petition stands disposed of, accordingly. Rule is made absolute.

13. On oral request of the learned Counsel for the respondent-plaintiff, this order shall remain stayed for a period of five weeks.

(J.H. BHATIA, J.)